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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 336

BURLINGTON TRUCK LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 337

GENERAL DRIVERS AND HELPERS, LOCAL 554, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellee Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

The present cases are on direct appeal from a final judgment, entered on April 27, 1961, by a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission, dated June 1, 1959. This order (J.S.A. 95)[1] granted a certificate of public convenience and necessity to Nebraska Short Line Carriers, Inc., authorizing it to perform interstate motor carrier operations as a common carrier of general commodities (1) between Omaha and Chicago, serving no intermediate points, and (2) between Omaha and St. Louis, serving the intermediate point of Kansas City, Missouri, but restricted, in each instance, to traffic originating at or destined to points in Nebraska (see J.S.A. 92–93).

The undisputed evidence of record, as set out in the Commission's Report (J.S.A. 71–95; 79 M.C.C. 599–615) is as follows:

1. The stock of the applicant corporation is held in varying amounts by several motor carriers which operate between certain points in Nebraska. Some of these stockholder-carriers hold certificates of public convenience issued by the Interstate Commerce Commis-

[1] For convenience, we refer to the decisions of the district court and Commission as printed in the Appendix to the Jurisdictional Statement filed in No. 336 by the Burlington Truck Lines, Inc., *et al.*, which we cite as "J.S.A." In addition, "J.S." refers to the Jurisdictional Statement in No. 336.

sion, and others hold motor carrier authority from the Nebraska State Railway Commission. All are carriers of general freight operating over regular routes in eastern and central Nebraska converging upon Omaha, Lincoln, and Grand Island, Nebraska, at which they interchange traffic with other motor carriers for movement to and from points beyond Nebraska (J.S.A. 72–74).

For several years, the stockholder-carriers have resisted all attempts on the part of the Teamsters' Union to organize their employees. Despite the general disinterest of the employees in seeking union membership, the union determined that organizational efforts should be concentrated upon the management of the stockholder-carriers in order to attempt to get the employees into the union. Failing in the attempt, the union thereupon decided to enforce their demands by bringing economic pressure to bear on the stockholder-carriers, declaring certain of the stockholder-carriers "unfair" and instituting a secondary boycott against their traffic on the part of the larger unionized carriers, some of whom opposed the application before the Commission and are appellants in this action. The stockholder-carriers are dependent upon the unionized carriers for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to certain so-called protection of rights or "hot cargo" clauses contained in

the contracts of the unionized carriers.[2] (J.S.A. 74–75.)

None of the stockholder-carriers, except Clark Brothers Transfer, had ever had any dispute with its employees, and no picket line had ever been established with respect to any stockholder-carrier except at Clark Brothers' Omaha terminal (J.S.A. 75).

2. Beginning in the early part of May 1956, certain of the stockholder-carriers began to experience difficulty in effecting normal interchange arrangements with the larger unionized carriers with whom they had done business. The difficulty was experienced primarily at Omaha, but also to some extent at Lincoln and Grand Island, and consisted of the refusal on the part of many of the larger unionized carriers promptly to accept outbound interline traffic tendered to them by the stockholder-carriers, and the refusal to turn over to the stockholder-carriers inbound traffic routed over their lines or inbound traffic which normally would have been turned over to them at Omaha and the other points named for ultimate delivery to interior points in Nebraska served by them (J.S.A. 75–76).

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[2] "Hot cargo" clauses provide generally that it shall not be cause for discharge if any employee refuses to go through a picket line of a union or refuses to handle "unfair" goods, and that the union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with a union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walkouts, or lockouts exist.

The application of the stockholder-carriers was supported before the Commission by a large number of persons operating businesses at fourteen cities and towns in Nebraska, who, in many instances, are dependent upon regularly scheduled motor carrier service to meet their normal everyday transportation requirements. As a result of the breakdown of interchange arrangements at Omaha, the shippers at these interior points in Nebraska experienced delays in the movement of their outbound shipments to the named destinations, and also delays, inconveniences and unforeseen expense in the movement of inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unrouted shipments in the most direct manner (J.S.A. 79–80). In addition, certain shippers at Omaha also supported the application. The unionized carriers had refused to cross picket lines at the places of business of these shippers, which resulted in the almost complete withdrawal of motor carrier service at the shippers' establishments (J.S.A. 80).

As the Commission stated in summarizing the situation with respect to the failure of the stockholder-carriers to effect adequate interchange arrangements with the unionized carriers (J.S.A. 76–77):

> At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which

are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. * * *

3. The Commission, in concluding that the present and future public convenience and necessity required operation by the applicant as a motor common carrier (J.S.A. 92), stated that "[w]here, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary

to carry out the purposes of the national transportation policy" (J.S.A. 91).

The Commission distinguished the situation here from one where it had refused to authorize new service, the need for which had been based upon service stoppages which had terminated over three years earlier pursuant to a court injunction (see *Galveston Truck Line Corp. Extension Oklahoma,* 79 M.C.C. 619, 622). The Commission pointed out that in the present case "such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing" (J.S.A. 91–92). On March 10, 1960, the Commission denied the petitions for reconsideration. Upon review the district court, with District Judge Mercer dissenting, upheld the Commission's report and order and dismissed the complaint (J.S.A. 1–70).

ARGUMENT

The appeals in the present cases raise legal issues which are of no general application and which are unlikely to recur in their particular factual setting because of subsequent changes in the law. Under the circumstances, the district court's affirmance of the Commission's factual determinations clearly do not warrant further review by this Court.

1. Both appellants argue at length in their jurisdictional statements that the Commission has no authority to certificate new carriers to meet what they characterize as merely "temporary" service deficiencies, *i.e.,* deficiencies which the existing carriers have corrected by the time of the eventual Commis-

sion decision, and that therefore the Commission's only remedies against future violations by certificated carriers of their statutory responsibilities lie in action under either Section 204(c) or 212 of the Act, 49 U.S.C. 304, 312.

There is nothing in the Interstate Commerce Act or in its legislative history to support appellants' contentions. The Commission's remedial armory for insuring that carriers adhere to their statutory responsibilities is not so limited as appellants would have this Court believe. Where the circumstances indicate that a particular service deficiency, though temporarily corrected, has a reasonable likelihood of recurrence, the Commission, within its broad certification authority, may authorize the establishment of new service to insure against the future potentialities of renewed service stoppages. See *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker Motor Freight*, 326 U.S. 60, 69–70; *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215, 219 (E.D. Pa.), affirmed, 317 U.S. 587; *cf.*, *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86. Were this not the case, the carriers would be largely free to ignore their stautory obligations whenever they calculated that their private interest in so acting would outweigh any risk of the authorization of a new competitive service.

Moreover, this general rule is not limited by any requirement that all of the carriers affected by the grant of the new service should be equally responsible for the prior service deficiencies. The Commission

must of course give appropriate consideration to this factor as well as to the impact of the new grant upon the ability of the existing carriers—both innocent and guilty—to perform their certificated services. But where, as here (J.S. 90), the Commission has fully considered these facts, the Commission clearly cannot be precluded from making an award it deems necessary in order "that future shipping needs be assured rather than left uncertain" (*United States* v. *Detroit Navigation Co., supra,* 326 U.S. at 241).

2. The fact that the particular cause for service stoppage in the present case was the unwillingness of some of the carriers to risk labor difficulties if they continued to provide adequate service to the non-union Nebraska carriers neither places the service inadequacy beyond the reach of the Commission's licensing power nor requires invocation of the primary jurisdiction of the National Labor Relations Act. The Commission has no concern with the question of whether its certificated carriers, the carriers with which they connect or the shippers they serve are or are not unionized, and it cannot license or refuse to license a carrier in the light of its own ideas as to proper labor relations in the transportation industry (see J.S.A. 89). Thus, the Commission could not reject an applicant merely because it had entered into a "hot cargo" clause with its employees or had refused to bargain with them.

Just as the Commission is not appointed as the arbiter of labor relations within the transportation industry, the National Labor Relations Board similarly is not given authority to determine transporta-

tion policy under the Interstate Commerce Act. As this Court stated in *Carpenters Union* v. *National Labor Relations Board*, 357 U.S. 93, 109–110, in rejecting an effort by the Board to determine the validity of "hot cargo" clauses involving transportation unions on the basis of their alleged impropriety under the Interstate Commerce Act:

> It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. * * *
>
> Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. * * *

In so holding, this Court referred to the Commission's decision in *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617, where it was expressly held (at p. 626) that, regardless of whether a carrier may enter into "hot cargo" contracts, it cannot "thereby relieve itself of [its statutory] obligations" and that it still is "obligated to accept and transport all freight offered to [it] in accordance with the provisions of their published tariffs." See *Pacific Gamble Robinson Co.* v. *Minneapolis & St. Louis Ry. Co.*, 105 F. Supp. 794, 802 (Minn.), affirmed, 215 F. 2d 126 (C.A. 8); *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475, 498–499, 128 F. Supp. 520 (Ore.); *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M.C.C. 719.

3. The relevance of the National Labor Relations Act to this particular case lies not in the primary jurisdiction of the Board over its subject matter but in the fact that a 1959 amendment to the National Labor Relations Act, which became effective approximately six months after the decision in this case, appears to have obviated the likelihood of a recurrence elsewhere of the particular problem which led to the grant of the certificate. Under Section 8(e) of the Act, 29 U.S.C. (Supp. II) 158(e), as amended, it is now an unfair labor practice for a union and an employer "to enter into any contract or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing with any of the products of any other employer, or to cease doing business with any other person." Contracts of this nature heretofore entered into are declared "unenforceable and void," and the National Labor Relations Board in a recent decision, *Mary Feifer, d/b/a American Feed Company, et al.*, 133 NLRB No. 23, decided September 20, 1961, has expressly found that the very "act of entering into, signing, executing, or making" a hot cargo contract is sufficient to establish a violation of the amended section.[3]

[3] As the Commission noted (J.S.A. 75), no such certainty as to the validity or invalidity of hot cargo contract clauses existed as of the time of the Commission decision here. See *Carpenters Union* v. *National Labor Relations Board*, *supra*, 357 U.S. at 101–104.

4. The question therefore presented in the present case is whether there is sufficient evidentiary basis in the record for the Commission's conclusion that, despite the termination of the service interruptions, "the present and future public convenience and necessity require operation by applicant * * *" (J.S.A. 92). The Commission believed that, where the service delays and stoppages had continued up to and including the time of the hearing, there could be no assurance that further delays would not take place in the future. It pointed out that the persons affected by the carriers' general acquiescence in the refusal of their employees to interchange traffic with the non-union Nebraska carriers were not limited to those carriers alone but included the many shippers in Nebraska who were unable to secure adequate service. Moreover, although it may be argued that future service difficulties could largely be obviated by an order directing the carriers to perform any interchange services regardless of any hot cargo clause to which they were signatory, the Commission clearly did not act irrationally in determining, in the light of the then current uncertain status of the labor law, that the promotion of an adequate transportation system meeting the needs of the commerce of the United States, within the meaning of the national transportation policy, 49 U.S.C. preceding 1, would best be insured by the establishment of a new carrier able to perform the needed services.

CONCLUSION

The district court opinion was correct and the appeal presents no issues of general importance warranting further review by this Court. The judgment below accordingly should be affirmed.

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